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ORIGINAL (3)

No. 96-7185

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

GARRIT BATES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WALTER DELLINGER
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4 pp

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Petitioner contends that the court of appeals erred in reversing the order of the district court dismissing the indictment in this case for failing to allege intent to injure or defraud the United States.

1. On September 8, 1994, petitioner was charged in a twelve count indictment returned in the United States District Court for the Northern District of Indiana. The indictment charged that on twelve separate occasions between January 15 and June 15, 1990, petitioner knowingly and willfully misapplied specified amounts of federally guaranteed student loan funds, in violation of 20 U.S.C. 1097(a).[1/] Pet. App. A4.

[1/] At the time of petitioner's charged wrongdoing, 20 U.S.C. 1097(a) declared guilty of a crime "[a]ny person who knowingly and willfully embezzles, misapplies, steals, or obtains by fraud, false statement, or forgery any funds, assets, or property provided or insured under [Title IV of the Higher Education Act of 1965]."

On February 7, 1995, petitioner moved to dismiss the indictment on the ground that a conviction under 20 U.S.C. 1097(a) requires proof of both conversion and the defendant's intent to injure or defraud the United States. On April 7, 1995, the district court granted the motion and dismissed the indictment. The court agreed that Section 1097(a) requires proof of intent to injure or defraud the government. Pet. App. A14-A23.

The court of appeals reversed. Pet. App. A1-A13. It held that intent to injure or defraud the United States is not an element of willful misapplication under Section 1097(a); instead, the government must prove that a defendant misapplied or converted Title IV funds and that he did so knowingly and willfully. Pet. App. A10. The court concluded (Pet. App. A13): "[a]lthough admittedly bareboned, the indictment in this case included all of the requisite elements of willful misapplication under §1097(a), and it certainly alleged sufficient facts to apprise [petitioner] of the charges against him."

2. Petitioner contends (Pet. 4-14) that the government must prove fraudulent intent as an essential element of a Section 1097(a) offense. Whatever the merits of petitioner's contention, it is not presently ripe for review by this Court. The court of appeals' decision places petitioner in precisely the same position he would have occupied if the district court had denied his motion to dismiss. If petitioner is acquitted following a trial on the merits, his contention will be moot. If, on the other hand,

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petitioner is convicted and his conviction is affirmed on appeal, he will then be able to present his contention to this Court, together with any other claims he may have, in a petition for a writ of certiorari seeking review of a final judgment against him. Accordingly, review by this Court of the court of appeals' decision would be premature at this time.[2/]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WALTER DELLINGER
Acting Solicitor General

JANUARY 1997

[2/] Because this case is interlocutory, we are not responding on the merits to the question presented by the petition. We will file a response on the merits if the Court requests.